No. 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

BOB WHITE,
Appellant,

vs.

THE STATE OF TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE STATE OF TEXAS

GERALD C. MANN,
Attorney General of Texas,
(Austin, Texas)
GEORGE W. BARCUS,
WM. J. FANNING,
Assistants Attorneys General,
(Austin, Texas)
LLOYD DAVIDSON,
State Criminal Attorney,
(Austin, Texas)
W. C. MCCLAIN,
District Attorney,
(Conroe, Texas)
Attorneys for the State of Texas

FIRM FOUNDATION - AUSTIN

INDEX

AUTHORITIES

AUTHORITIES—Continued

No. 87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

BOB WHITE,
Appellant,
vs.
THE STATE OF TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE STATE OF TEXAS

PRELIMINARY STATEMENT

1.

Petitioner, Bob White, a negro, was convicted in the District Court of Polk County, Texas, of the capital offense of rape by assault upon Mrs. Ruby Coch-

ran, a white woman, which conviction was reversed and remanded by the Texas Court of Criminal Appeals. (117 S. W. (2d) 450.) Upon petitioner's application for change of venue, the cause was transferred to Montgomery County, Texas. Petitioner was again convicted in the District Court of Montgomery County, Texas, of said offense and given the death penalty, which conviction was affirmed by the Texas Court of Criminal Appeals. (128 S. W. (2d) 51.)

Petitioner filed in this honorable court his petition for writ of certiorari, to review the judgment of the Texas Court of Criminal Appeals, which was on October 13, 1939, dismissed by this court. Petitioner filed his petition for rehearing and on March 25, 1940, this court reversed the judgment of the trial court. The State of Texas filed its petition for rehearing in this court, and on April 22, 1940, this court entered the following order in this cause:

> "This cause is set for May 20, 1940, in order to afford to the State of Texas the opportunity to present its contentions upon the questions set forth in subdivisions (e), (f), (g), (h) and (j) of paragraph 4 of its petition for rehearing. The case will be heard on briefs and oral argument, or on briefs alone if that is desired, briefs to be filed and served on or before the date above mentioned."

The questions set forth in subdivisions (e), (f), (g), (h) and (j) of paragraph 4 of the state's petition for rehearing are as follows:

> "(e) Whether the record reflects that the deci-

sion of, and the disposition made of this cause was based or founded upon any substantial federal question as distinguished from an adequate state question.

"(f) Whether the record reflects that in the Court of Criminal Appeals of Texas, in the submission and determination of this cause, there was drawn in question the validity of a statute of the state of Texas as being repugnant to the constitution or laws of the United States, and the decision of that court was in favor of the validity of the statute.

"(g) Whether the record sustains, as a matter of fact, the conclusion of this court that the petitioner's confession was obtained in violation of any provision of the constitution or laws of the United States.

"(h) Whether the record reflects facts which bring this case within the rule announced by this court in the case of Chambers vs. Florida, 195, decided February 11, 1940.

"(j) Whether a confession made in conformity with the laws and applicable statutes of the state of Texas, governing the making and taking of confessions, and thereafter used by the prosecution upon the trial of the confessor, for an offense confessed or admitted therein constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, or any other provision thereof."

2.

The pertinent facts in this cause and the holding of the Texas Court of Criminal Appeals are contained

in the opinion of said court (R. 139-141) as follows:

"The facts in this case show that Mrs. Ruby Cochran was the wife of W. S. Cochran, and that she was the mother of two little boys, one eleven and the other thirteen years old; that her husband was a farmer, and also had a store on his farm near his home. That on the night of the day charged in the indictment Mr. Cochran was absent from his home, and his wife was there alone, save for her two little boys. That after she had gotten the little boys to sleep downstairs she retired to a large room upstairs, and prepared for bed, removing all of her clothing and placing a nightgown on her body. That she had a pistol that she oftentimes took to bed with her when alone. That early in the night she heard some peculiar noises in the house which aroused her, but to which she paid no further attention other than to take her pistol in her hand and listen. Again she heard a noise and something caused her bed to shake. Her bed was near a window, with the shade up, and after she felt her bed shake she said, 'Joe, is that you?' Her little boys had sometimes been in the habit of coming into their mother's room when they awakened at night, and when she made this remark she thought it might have been her son, Joe, who had shaken her bed. Immediately some one leaped upon her on the bed and she began to struggle with him. She then jumped off the bed, screaming, and ran to the window and attempted to leap through it, and struck her head thereon, but on account of such window being screened, she was unable to get through the intruder grabbed her and pulled her back. She continued struggling with him, and grasped one of his hands and found an open knife therein, which was pulled

through her hand, cutting it. She then attempted to reason with this person, and told him, 'Don't you know what the Cochrans will do to you,' and he replied with an oath, 'I don't care what they do to me; I don't care what happens to me.' After having become exhausted in her struggle, the intruder threw her to the floor and ravished her, threatening to kill her, and holding his knife on her. This man satisfied his lust upon her body; she being in such a helpless condition, that after leaving her body on the floor and starting out of the room, he returned and placed his hand on her, and then immediately left. As soon as she had recovered, Mrs. Cochran gave the alarm to the neighbors, and her husband's brothers immediately, and she was taken into town to a hospital. Barefooted tracks were found near the house, and appellant in his confession corroborates the story of Mrs. Cochran in most of its details. He gave a description of the interior of the house, from its entry until he left the same; he tells of his progress through this house which he had never before entered, giving many details that could only have been known by observation; he tells of this conversation relative to what the Cochrans would do to him, as well as what he did to Mrs. Cochran at the scene. He also told of the incident of the knife, and her attempts to get away by leaping through the upstairs window; how he dragged her back, and of hearing something fall on the floor when she lost her pistol; he also told of returning and feeling her body to see whether she was dead, and then he described his barefooted flight from the house. He also told of an incident that happened on his trip to the house relative to passing a neighbor's home and hearing a little girl complaining to her father because of

the fact that a big dog had bitten the little girl's puppy, which incident found confirmation in the statement of both the little girl and her father, and which could only have been known to him by his having heard it, thus showing his proximity to the Cochran home on the night in question. His confession contained so many corroborative statements of Mrs. Cochran's testimony that it is abundantly convincing that he was bound to have been present at the time the crime was committed. Mrs. Cochran did not identify the appellant; there was no light burning at the time the crime was committed, but she does say that her assailant was barefooted; that he had a very offensive breath, and was undoubtedly a negro.

"The District Judge gave a comprehensive charge on the law of the case, and in an excess of caution embodied therein a charge of circumstantial evidence, and we think that he has accorded the appellant every right that he was entitled to under our laws and Constitution. We think that the facts unerringly point to the appellant as the assailant of this lady, and that they exclude every other reasonable hypothesis than his guilt. We think that under the facts the jury was justified in the assessment of the extreme penalty, and so believing this judgment is affirmed.

Graves, Judge"

The confession of Bob White on its face is in strict conformity to the provisions of the statutory law of the State of Texas. It contains the statutory warning and is witnessed by two disinterested parties. Each page of the confession is separately signed and witnessed. (R. 35-41.) See Article 727, Texas Code of Criminal Procedure.

Bob White was tried first in Polk County where the crime was committed and received the death penalty. On appeal, the case was reversed because of improper argument of counsel. (117 S. W. (2d) 450.) The second trial was in Montgomery County, same having been transferred there on a plea of venue, filed by the defendant, and resulted in a death penalty, which was affirmed by the Court of Criminal Appeals of Texas. (128 S. W. (2d) 51.)

As the State of Texas understands the only questions for this court to determine are those embraced in subdivisions (e), (f), (g), (h) and (j) of the State of Texas' petition for rehearing. Neither of these raise any question about the guilt of the defendant, or about his having obtained a fair and impartial trial, save and except those questions revolving around and involving the condition under which the confession of Bob White was obtained. The above subdivisions have been copied in the preceding pages of this brief.

MAIN ISSUE

The State of Texas believes the controlling question in this case may be stated as follows:

Under the facts in this case was the confession of Bob White voluntary and given in accordance with the laws and Constitution of the State of Texas and in accordance with the Constitution of the United States? Or put in different language was the confession extracted from Bob White by unfair, coer-

cive or in such illegal ways as to deprive him of his rights under the 14th Amendment to the Constitution of the United States?

STATEMENT, ARGUMENT AND AUTHORITIES

In order that the court may get the viewpoint of the State of Texas, we give the following summary of the testimony relative to how the confession was obtained and what was said by the parties.

A summary of the facts upon this issue may be stated as follows:

(a) Petitioner alone testified that violence was used by the officers.

(b) He was contradicted directly by witnesses for the prosecution upon this point who asserted no violence was used.

(c) Petitioner denied execution of or the making of the confession.

(d) As to this he was thoroughly contradicted, by evidence showing he not only signed by mark but gave the confession and upon a former trial of the case admitted having made the confession.

(e) Petitioner claimed that he was carried from the jail at Livingston on four consecutive nights and whipped by the rangers whom he did not know by name.

(f) The Rangers denied whipping him but admitted having taken petitioner out of jail for the purpose of talking to him.

In support of these statements, we give the following summary of the testimony relative to how the confession was obtained and what was said by the parties:

Bob White testified he was arrested Wednesday morning, that he was taken out of the jail Thursday night into the woods and whipped with a rubber hose and was kept out about one hour and a half (R-89-90). He testified he was taken out another night and whipped and was kept out about one half hour (R-90). He testified "they took me to Beaumont about three or four days after they got through with whipping me, they whipped me four nights" (R-90). He testified "I did not know what was in that statement (confession). At the time I signed it I never knowed. I never signed it. I ain't never signed it. I did not make a mark on it. I did not see any body hold the pen at the time the mark was made. That was on Saturday night and I remained over in Beaumont until Sunday evening. I don't know what day of the week it was I went down there. I don't know what day of the week it was when I was there." (R-91).

Bob White testified "I never did tell anyone that I did do that (Commit the crime). The reason I never did tell anyone that I did it was because I knew I didn't do it. I knew I was not guilty of the crime." (R-92).

Ernest Coker was the County Attorney who took the confession (R-34). Bob White testified "Ernest Coker never said a harsh word to me in his life. He has always treated me courteous, fair and right. These times that I claim that somebody carried me out somewhere down there and whipped me I don't tell anybody that Ernest Coker was with them. (R-94). Bob White testified "As to whether Mr. Appling, the druggist in Beaumont, was in there I don't know him. If he was the first man on the stand here I don't know him. He was not in there that I know of. He may have been in there but I didn't see him. He is not the man that read the statement over to me. Mr. Ernest Coker is the man that wrote it. I say that Mr. Appling did not read it to me. If he is the first man who went on the witness stand this morning I don't know him, if he was in there I didn't see him. (R-96-97). As to whether I saw another man there by the name of Crocker, there was so many there I didn't know one from another. I do not remember the man who gave me the pen that I made these crosses with. As to whether I made them with a fountain pen, I don't remember making them at all. I did not make that cross right there. I know I never touched it. I did not make that cross. I did not touch the pen while that cross was made. I did not see those two men sign their names on that front page. I never made this cross here on the next page and I did not touch the pen when it was made. I did not see those men sign their names there. On page 3 I did not touch the cross. I did not see those gentlemen sign their names there. On page 4 I did not make that X I did not see those gentlemen sign their names

there. On page 5 I did not make that cross I see where Mr. Appling's name is signed there. . . . I said I did not touch the pen when these crosses were made on these five pages of paper in Beaumont down there, which is witnessed by those gentlemen whom I never seen. I say I never done that. (R-97). Bob White testified "It is a fact that during that period of time (while the confession was being taken) that we are talking about you sent out and got coffee and I drank some. We went out and got some water when you and I went back to get a drink of water you did not say an unkind word to me. You never have in your life." (R-98).

Z. L. Foreman testified that he went with Ernest Coker, the County Attorney at the time the statement was obtained from Bob White, that H. R. Appling and Herman Crocker and the Sheriff and some others were present at the time. That Mr. Coker, the County Attorney, gave Bob White a warning and read over to Bob White a statement "we had asked Bob White if there was anything wrong in the statement to correct it and right on down the line like you and I are sitting here talking to you. Ernest Coker used the typewriter. He was County Attorney of Polk County: I don't know who dictated that statement. I don't think it was dictated. Bob White told what happened and Mr. Ernest Coker here put it down." (R-116). Foreman further testified that on the former trial of the case at Livingston, Bob White testified "I went to Cochran's and bought some lard in 1936." He further testified that White on the former trial testified "I will tell you the truth about it

as well as I know. I made this little x mark on the statement. I was touching the pen. I touched the pen on page 2, I touched the pen on page 3, I touched the pen on page 4, I touched the pen on page 5, I made that little X mark." (R-117). Mr. Foreman further testified that on the previous trial at Livingston Bob White testified as follows: "I remember seeing Mr. Appling, the man who testified here today, that he was in Beaumont and that he read the statement over to me. I remember seeing him in Beaumont. He never said a cross word to me." (R-117). Mr. Foreman further testified that Bob White in the former trial testified as follows: "After I had made this statement Mr. Appling, the man who was a witness on the stand, took his time and read it over carefully and slowly to me." (R-117). Mr. Foreman further testified that Bob White on the former trial testified as follows: "Mr. Coker told me that I did not have to make any statement at all. Mr. Coker told me that any statement I did make could be used in evidence against me. Mr. Coker wrote the statement down." R-117). Mr Foreman further testified that Bob White on the former trial at Livingston testified as follows: "The Rangers did not make me say what I said in that statement. Mr. Coker did not make me say what I said in this statement. Mr. Foreman did not make me say what I said in this statement. Mr. Appling did not make me say what I said in this statement. Mr. Crocker did not make me say what I said in this statement. Nobody made me say what I said in this statement." (R-119).

Mr. Foreman further testified that when the con-

fession was obtained from Bob White at Beaumont "the statement was absolutely made in my presence from the beginning to the end. At the time he was there he (Bob White) rolled up his sleeves just as high as he could at my request. I was as close to him as I am to Mr. Graham (the Reporter) you might say closer, that is about three feet. I did not discover any scar or bruises or abrasions on his arms anywhere. If there were any there I did not see them. I never heard of it until the other trial. I saw his arms as high as he could roll his sleeves at that time. At that time he made no complaint with reference to it." (R-122).

Herman Crocker testified that he was a salesman from the Beaumont Motor Company and had never served as a peace officer, that on the night of August 18, 1937, he saw the defendant Bob White in the Beaumont jail for the first time. That he recalled Bob White having made a statement and he identified the one offered in evidence as the one that had been made. He testified "the County Attorney of Polk County wrote that statement out, that is the gentleman sitting back there. After the statement had been reduced to writing Bob White held this fountain pen here the top of it like that while the county attorney signed it and made his mark. This is the same fountain pen. Before Bob White signed this statement that I have in my hand it was read over to him two different times very close and carefully all the way through and was asked 'Is that right Bob?' All the way through. Mr. H. R. Appling, the other witness to the statement read it to him . . . He

was asked if he wanted to make a statement and he said yes and he broke down and commenced crying. Tears were running out of his eyes and he was asked if he felt better since he had broke down, and he was asked if he had made up his mind to make a confession and he said yes, and they went on then and started. The County Attorney started typing this then. This is the statement he made. Mr. Coker wrote it down as he said it. He was asked very carefully and every word repeated as high as three times on each one." (R-123).

M. W. Williamson testified that he was a State Ranger and had been since 1935, and assisted in investigating the crime in question in August 1937. He testified "I never at any time struck or beat or whipped the defendant Bob White. I did not at any time on the occasion of the investigation of the offense ever handcuff him around a tree and whip him. He was never whipped or beaten or mistreated at any time in my presence. (R-124). He further testified "I testified on the trial at Livingston (former trial) that 'I don't know exactly the number of times that I took this negro out from the jail during the time he was confined in jail because I took him out so many times.' I further testified at Livingston that 'I would take them out on the road, I would drive out off of the road with them.' It is my testimony now that no one at any time in my presence ever handcuffed Bob to a tree or whipped him. I did not threaten at any time as to what was going to happen to him if he didn't sign the statement. I didn't do that I did not know of that ever having been done." (R-

125). He further testified "we took him out of jail to talk to him. The jail was crowded. There was lots of them in there and we took him out where we could be by ourselves and talk to him." (R-126)

E. M. Davenport testified that he was a State Ranger and had been for about 3½ years, that he helped investigate the crime in question. He testified "at the time I was there, I had occasion to hear and talk to Bob White, the defendant, as to whether me or anyone else in my presence ever beat or whipped him or handcuffed him to a tree or kicked him, there never was any body kicked or whipped him either. I did not see anybody handcuff him to a tree and beat him" (R-127).

Coleman Weeks testified that he was a peace officer in 1937. He was asked this question: "Mr. Weeks you recall yesterday the defendant pointed you out as one who mistreated him while he was in jail? I will ask you to state to the jury whether or not at any time you whipped, beat or mistreated the defendant in any way? Ans. No sir I never have. No one in my presence whipped or mistreated the defendant in any way. I have no knowledge of any one whipping or mistreating the defendant during the time he was under arrest." (R-128).

From the above excerpts from the testimony which we believe fairly present the question, it occurs to us that there is very little similarity between the facts in the case at bar and the *Chambers* v. *Florida* case. In the Florida case, as revealed by the opinion of this

Court, the State put bloodhounds on the trail. A convict guard by the name of J. C. Williams took a prominent part in the investigation. The defendants were carried to an adjoining county because they feared mob violence. On the road from one jail to another the Sheriff told a speed cop that he was taking the negroes to the Miami jail to escape a mob. The defendant was kept in the death cell of the county jail from Sunday, May 14 to Saturday, May 20. Some thirty to forty negro suspects were subjected to questioning and cross-questioning from Saturday afternoon until sunrise of the next day, the defendants underwent persistent and repeated questioning and this was continued for several days, and all night before the confessions were secured, and were referred to as an "all night vigil." The defendants were kept under constant vigil for more than a week and under constant questioning by the officers. In the opinion by this court it is stated "The testimony is in conflict as to whether all four petitioners were continually threatened and physically mistreated until they finally in hopeless desperation and fear of their lives, agreed to confess on Sunday morning just after day light. Be that as it may it is certain that by Saturday, May 20, five days of continued questioning had elicited no confession, admittedly a concentration of effort—directed against a small number of prisoners including petitioners—on the part of the questioners principally the sheriff and Williams, the convict guard, began about three thirty that Saturday afternoon and from that hour on with only short intervals for food and rest for the questioners—they all stayed up all night. 'They bring one of them at the time

backward and forward . . until he confessed,' and Williams was present and participating that night during the whole of which the jail's cook served sandwiches and coffee to the men who grilled the prisoners.

"Sometime in the early hours of Sunday the 21st, probably about two thirty Woodward apparently broke as one of the State's witnesses put it—after a fifteen or twenty minutes period of questioning by Williams, the Sheriff and Constable one right after the other. The State's attorney was awakened at his home and called to the jail. He came and was dissatisfied with the confession of Woodward which he took down in writing at that time and said something like 'tear this paper up that isn't what I want. When you get something worth while call me.' This same State's attorney conducted the State's case in the Circuit court below and made himself a witness but did not testify as to why Woodward's first alleged confession was unsatisfactory to him."

The officers who were present in the Florida case at the time corroborated the statement that the District Attorney Maire said that the first confession was not sufficient and would not support a conviction and that they would have to get more out of the negro defendants than they had, and that after the District Attorney had made that statement to them the defendant was then put through some more grilling examninations and threats and then late in the night made another confession which was satisfactory to the District Attorney. The State refused to

produce the first confession and in fact destroyed it. The officers in the Florida case, corroborated the defendants in many ways.

In the case at bar Bob White, the defendant, himself on the first trial testified that he signed the statement; that he signed each page thereof; that Mr. Appling, one of the witnesses, read the statement over to him; that Mr. Coker, the County Attorney, warned him that the statement could be used against him; he testified on the first trial that Mr. Appling was present, and that neither the Rangers nor anyone else made him make the confession (Foreman testimony R 116-119).

On the last trial Bob White testified that Mr. Appling was not present at the time he made his confession; that Appling did not read it over to him. He testified that he did not even sign the confession and did not give the officers the information contained therein; he emphatically denied knowing about what was in the confession or having at any time signed or consented thereto or having made the cross marks for his signature (R-96-97).

On the last trial Bob White testified that the County Attorney, Mr. Coker, as well as the sheriff treated him kindly; that while the confession was being given he and the County Attorney had coffee together; that they went out to get a drink of water together and that not an unkind word was said to him by Mr. Coker who took down the confession. (R-96-7).

Each of the officers who took the defendant Bob White out of the jail or who talked to him and who was accused by Bob White of having whipped him or used any unfair means or methods took the stand and denied emphatically having used any such force, threat or intimidation. Mr. Appling, a druggist in the city of Beaumont, testified that he did not know the defendant or any of the parties prior to the commission of the crime. He was called in as a citizen to witness the confession and he testified positively that he read the statement over to Bob White and that Bob White understood the matter and was perfectly willing and apparently seemed glad to make the statement after he had decided to confess. (R-33). In contrast to this Bob White testified that he did not even know Mr. Appling and never saw him; that Appling was not present at the time the confession was made; that he (Appling) did not read it over to him. (R-96-97). However, in this connection it is well to note that Bob White in his first trial testified that Mr. Appling was present and that Mr. Appling did read it to him and explain the statement to him. (R-117).

These conflicting statements made by Bob White himself stating at the first trial that he did sign it, and then on the second trial that he did not sign it, and then stating that he was forced to sign it, and then denying the various things that he testified to on the first trial; and his testifying to an entirely different state of facts on the first trial and the last trial; and his not being corroborated by a single witness; and when he exhibited his body and

arms to the officer at the time the confession was made there was no indication that he had been ill treated or bruised or that he had been handcuffed to a tree, and brutally assaulted; shows that Bob White was not forced to make the confession by any unlawful, unjust or unjustifiable means.

The facts in this case are so different from those in the case of *Chambers* v. *Florida* and *Brown* v. *Mississippi* that we submit neither of those cases are decisive of, neither should they be considered as authority for reversing Bob White's case.

If the confession of Bob White under the record as revealed is not admissible then no confession could ever be used against any defendant. Most of the material statements made by him in his confession are corroborated and were proven to be true by following up the statements which he made in his confession. Bob White stated in the confession that he heard a child complaining about the big dog jumping on her little dog and this was corroborated by the child and her father. He stated that he took off his shoes at the gate and walked barefooted into the house, this statement was corroborated by the facts on the ground. He described the furniture in the house in a way that no one could have described it unless they had actually been there. He described the falling of the pistol on the floor which Mrs. Cochran, the woman, corroborated. He described her having run against the screen window trying to get out and could not because of the screen being fastened and that fact was corroborated by the

torn place in the screen. He testified that the brothers of Mrs. Cochran passed the house shortly after the crime and they testified to that fact. Practically every statement made in his confession that tended to show his guilt was traced down and proven to be true.

AUTHORITIES

Article 727, Vernon's Annotated Texas Code of Criminal Procedure, reads as follows:

> "The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed. If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness."

The case of *Wilson* v. *United States*, 162 U. S., page 613 et seq., 40 L. Ed, 1090 et seq., holds that where there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that is is admissible, the question may be left to the jury, with the direction that they should reject it if, upon the whole evidence they are satisfied that it was not the voluntary act of the defendant. This case also holds that false statements made by an accused person, in explanation or defense, may be regarded by the jury as tending to show guilt.

The case of *Murphy* v. *United States*, 285 F., 801 et seq., holds that disputes between witnesses as to whether a confession is voluntary must, like other controverted issues, be left for the jury. This case further held that the defendant's claims before the trial court were inconsistent with the position he took in the appellate court, and that the confession was voluntary.

Volume 1, Ruling Case Law, Admissions and Declarations, Section 122, pages 577-579, inclusive, read as follows:

> "Voluntariness as Question of Law or Fact. —It is the province of the court and not of the jury to determine in the first instance whether or not a confession offered in evidence is voluntary, and this is done when it is offered in evidence. If the court decides that it is voluntary it receives the confession. If, on the other hand, it decides that the confession is not voluntary it rejects it, and that is the end of the matter un-

less some question of law is reserved. In many jurisdictions, however, where the evidence on the question of voluntariness is conflicting, or where the court is in doubt whether the confession was or was not voluntary, the whole matter may be left to the jury under instructions to disregard the confession unless they find that it was made voluntarily. After a confession has been admitted by the court, either party has a right to produce before the jury the same evidence which was submitted to the court when it was called upon to decide the question of competency, and all other facts and circumstances relevant to the confession, or affecting its weight or credit as evidence; and if it should be made to appear at this point, or at any time during the progress of the trial, that the confession was made under such circumstances as to render it incompetent as evidence it should be excluded by the court. When the confession is admitted in evidence as competent and is not rejected by the court during the trial its weight and value as evidence are for the jury. It has been stated, however, that when a confession has been admitted in evidence by the court and there is conflicting evidence as to whether it was a voluntary confession the question of veluntariness should be left to the determination of the jury, like every other question of fact, under instructions to disregard wholly the evidence of the confession unless they are convinced and find, upon all the evidence adduced, that it was voluntary."

Volume 1, Ruling Case Law, page 584, reads in part, as follows:

"Where a prima facie case by the prosecution

warrants the court in admitting the confession in evidence the mere fact that the defendant testifies that he made his confession through fear and under duress is not, of itself sufficient to overcome the prima facie case and the testimony of the officer to whom the confession was made that it was made voluntarily. So confessions of a person accused of crime cannot be excluded merely because he testifies that they were obtained by duress or by promise of immunity, where his testimony on this subject is contradicted by that of other witnesses. THE DETERMINATION OF THE TRIAL COURT THAT A CONFESSION OFFERED IN EVIDENCE WAS VOLUNTARY WILL NOT BE INTERFERED WITH ON APPEAL UNLESS THERE IS CLEAR ERROR." (Capitals ours.)

The case of *Allen, et al* v. *United States, Circuit Court of Appeals, 7th Circuit*, 4 F. (2d) 688, holds that the Federal Appellate Court will not determine the weight of conflicting evidence and that the weight of the evidence and the credibility of witnesses are for the jury to determine. We quote from the court's opinion as follows:

"Before discussing the evidence, it may be well to set out that the rule laid down in Applebaum v. United States (C. C. A.) 274 F. 43, and frequently followed by this court (Holy v. United States, 278 F. 521; Grossman v. U. S., 282 F. 790-793; Wolf v. U. S., 283 F. 885, 888; Talbot v. U. S., 286 F. 21; Ink v. United States, 290 F. 203), must govern us in determining whether there is present a jury question. It is of no avail for counsel to cite cases which

have attempted to draw a distinction between 'evidence' and 'substantial evidence,' or to point out to an occasional decision where the appellate court weighed the evidence and reviewed the decision of the jury, upon a disputed issue of fact, for such is not the rule in this jurisdiction. *The right of an accused to a trial by jury upon all issues of fact is guaranteed by the Fifth Amendment to the Constitution. But the accused cannot have both a trial by a jury, and a retrial by an appellate court. If the evidence be conflicting, then the issue is one for the jury, and no asserted distinction between 'evidence' and 'substantial evidence' can afford a basis for a modification of this rule.*" (Italics ours.)

The case of *Jabczynski* v. *U. S.*, 53 F. (2d) 1014, certiorari denied, 52 S. Ct. 285, U. S., 546, 76 L. Ed. 937, holds that because a variance exists between government and defendant's testimony it does not necessarily mean that defendants are right and government's witnesses are in error.

The case of Burton v. U. S., 202 U. S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, holds that if there is sufficient evidence to go to the jury in a criminal case, the Supreme Court of the United States will not weigh the facts and determine the guilt or innocence of the accused by a mere preponderance of evidence, but will limit its decision to questions of law.

The case of Coltabellotta v. U. S., 45 F. (2d) 117, holds that the jury may disbelieve defendant's testimony and take facts disclosed by government's evidence as true.

The case of People v. Freer, 285, P. 386, 104 Cal. App. 39, holds that the jury could reject entire statement of defendant or any part thereof.

The case of Commonwealth v. McCarty, 172 N. E. 97, 272 Mass. 107, holds that the jury may consider defendant's false testimony as evidence of guilt.

The case of Metz v. State, 74 S. W. (2d) 1025 127 Tex. Cr. R. 126, holds that the jurors were not bound to believe testimony of accused, since accused was an interested witness.

The case of Cross v. State, 129 Tex. Cr. R. 526, 89 S. W. (2d) 217, holds that where testimony raises issue as to whether confession is voluntary and matter is submitted to jury, its finding is conclusive.

The case of Black v. State, 128 SW (2d) 406, holds that where defendant claimed alleged confession was not voluntary, submission to jury of questions where the necessary statutory warning had been given to defendant prior to time he made confession and where the confession was voluntarily made was all that the defendant was entitled to.

The case of Seals v. State, 73 S. W. (2d) 528, holds that a confession in robbery prosecution was properly admitted, notwithstanding accused claimed that he made confession to get out of dark cell where officer taking confession testified that confession was freely and voluntarily made.

The case of Carr v. State, 24 Tex. App. 562, 7 S. W. 328, holds that where the confession states that in committing burglary the defendant acted under the compulsion of another person, and is contradicted by that person himself, the jury must determine the credibility and weight of the evidence, and in doing so they may believe one portion of the confession, and reject as untrue another portion contradicted by evidence produced.

The case of Rios v. State, 7 S. W. (2d) 535, holds that a confession is admissible if the accused in connection therewith makes statement found to be true which conduces to established guilt.

The case of Kincaid v. State, 131 Tex. Cr. R. 101, 97 S. W. (2d) 175, holds that in an incest prosecution, the denial of accused on witness stand that woman was his niece and later admission by him that she was, and a denial that he knew instrument he signed was confession though competent witnesses stated that defendant made confession after being fully warned, and that details of the confession were his own, confession was held admissible and voluntary.

The case of *Brown* v. *Mississippi* (297 U. S. 278), is clearly distinguishable. In that case the officers admitted using force and compulsion and the same was clearly proven and not denied.

The case of *Chambers* v. *Florida*, is also clearly distinguishable. In the *Chambers* v. *Florida* case, petitioner was subjected to long, protracted, continuous, ceaseless questioning without food and rest by relays of questioners who questioned petitioners

until they became tired. This was admitted by all parties and was undisputed evidence in that case. It was also the undisputed evidence in that case that about three-thirty one Saturday afternoon the sheriff and convict guard and a crowd of officers and citizens began to question the defendant and from that hour on, with only short intervals of rest and food, for the questioners, and not for the defendant, the questioners conducted an all night vigil until about two-thirty A. M. when the said defendant gave one confession which was not satisfactory to the State's attorney who instructed the sheriff to get 'something worth while' in the nature of a confession, and call him when they got it and that just before sunrise the sheriff got his confession from the defendant more 'worth while'. The confession was only corroborated by the confessions of three other confessors.

In the case at bar there is no evidence in the record showing the type and kind of questioning as shown in the *Chambers* v. *Florida case;* there is no evidence on record in this case that the defendant was deprived of sleep; there is no evidence in this record that the defendant, Bob White, was deprived of food; there is no evidence whatsoever in this record that the officers in any way exceeded the due bounds of propriety in questioning the said Bob White. The petitioner, Bob White, does not in his testimony any where say or swear that the officers or rangers or attorneys harrassed or ceaselessly questioned him, caused him to lose sleep, and kept him from food, to such an extent that they broke

down his resistance and that he therefore executed the confession. That is not the theory of the defendant nor his counsel. It will be specifically remembered that the petitioner, Bob White, has steadfastly denied in his trial that he ever executed the confession at all.

It seems inconceivable that the defendant should contend before this honorable court that a confession by force or a confession by repeated questioning, without rest or food, through a long night's vigil, was extorted from him by the officers, especially in view of the fact that he swore positively that he did not sign the confession. He swore that he did not sign the confession in the face of the evidence of the county attorney of the county, Mr. Foreman, the former county attorney, Mr. Appling, a druggist, and a disinterested witness, Mr. Crocker, an automobile salesman, and a disinterested witness, and other persons. Surely, the jury, after hearing the evidence of Bob White, and after hearing the evidence of the state's witnesses, and after observing all of said witnesses and their conduct and demeanor upon the witness stand, had a right to disbelieve the testimony of Bob White, and they did disbelieve such testimony.

It is fundamental law that the jury is the judge of the credibility of the witnesses and of the weight to be given their testimony. The reason for this rule is obvious; the jury can observe the conduct and demeanor of the witnesses upon the witness stand. Appellate Courts cannot pass upon the credi-

bility of witnesses and the weight to be given their testimony because of their lack of actual observation of the witnesses upon the witness stand.

A defendant in a criminal case is an interested witness and the jury is not required to believe his testimony. The jury in this case did not believe Bob White's testimony that the officers whipped, mistreated and threatened him. They had a right to disbelieve his testimony. The jury had a right to believe the testimony of the officers that they did not whip, mistreat or threaten petitioner, that they carried him out of jail to talk to him because of the crowded condition of the jail, and that the confession was in all things voluntary as proven by a large number of reliable witnesses.

Certainly, this honorable court cannot say, in the face of this record, and in the absence of any testimony similar to that in the Chambers case, that the defendant, Bob White, signed a confession because of long, protracted, repeated, all-night questioning, without food or rest, especially since the defendant himself did not swear to any of those things, and especially denied that he even signed and made his mark on the confession. This honorable court cannot guess and speculate upon the evidence.

We call attention to the fact that this case is before this court for a review of the judgment of the Court of Criminal Appeals of Texas, and as lending credit to the conclusion reached by that Court, as being in thorough accord with the ruling of this

Court in the case of *Brown* v. *Mississippi*. supra, we call attention to the case of *Abston* v. *State*, 102 S. W. (2d) 428 and 123 S. W. (2d) 902, which was written long before *Chamber* v. *Florida*, supra.

Expressions there contained and conclusions there reached demonstrate the complete harmony with and a perfect willingness on the part of the Court of Criminal Appeals of Texas to accept the views of this Court and lends weight to our contention here that this record does not reflect facts showing that the confession in the case was coerced or obtained in violation of any law.

CONCLUSION

The issue as to whether the confession was voluntary was fairly and adequately submitted to the jury by the learned trial judge under appropriate instructions of law. The jury, after observing the witnesses and hearing their testimony, found that the defendant's confession was voluntary in all respects, that the evidence was sufficient to convict the defendant, and by their verdict they have foreclosed the question as to defendant's guilt and the admissibility of this confession.

We respectfully submit that the facts in this case amply support the verdict of the jury and we pray that the State's petition for re-hearing be granted, the writ of certiorari be denied and that the judgment of the Court of Criminal Appeals of Texas be in all things affirmed.

J. P. Rogers, F. S. K. Whittaker, S. F. Hill and Carter Wesley, attorneys at law, of Houston, Texas, are of counsel for petitioner, and they have been furnished copies of this brief.

GERALD C. MANN,
Attorney General of Texas,
(Austin, Texas)

GEORGE W. BARCUS,
WM. J. FANNING,
Assistants Attorneys General,
(Austin, Texas)

LLOYD DAVIDSON,
State Criminal Attorney,
(Austin, Texas)

W. C. MCCLAIN,
District Attorney,
(Conroe, Texas)

Attorneys for the State of Texas